

Supreme Court considers blanket immunity for Trump

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On Tuesday, the Supreme Court held oral arguments by telephone on expedited petitions by President Donald Trump to block lower court orders that compel his accounting firm, Mazars USA, and two of his biggest lenders, Deutsche Bank and Capital One, to turn over tax returns and other financial documents. The documents relate to transactions that occurred prior to Trump's taking office.

The first case concerns congressional subpoenas served by the House Oversight and Reform Committee, which claims the documents will help formulate appropriate conflict of interest rules, given Trump's complex international financial holdings, and by the Intelligence and Financial Services committees, which are investigating purported foreign influence in the 2016 election.

The second case arose from subpoenas issued by a Manhattan grand jury, which is investigating payoffs made on candidate Trump's behalf to silence women with whom he allegedly had sexual affairs, a potential violation of New York campaign finance laws.

The decisions to be handed down later this year are widely viewed as potentially historic in scope and impact. They threaten both to undercut congressional authority to rein in the executive branch and create a novel presidential immunity from criminal investigations. Both would be significant steps toward the consolidation of a "unitary executive" that can wield unchallengeable authoritarian rule.

There are significant layers of the ruling class that want a unitary executive, even in the hands of a sociopath like Trump, to confront the exploding social crisis in the United States and the mounting geopolitical crises facing American imperialism around the world.

The goal of insulating Trump seemed to animate the comments and questions of the five most right-wing justices—Chief Justice John Roberts and Associate Justices Clarence Thomas, Samuel Alito, Neil Gorsuch and Brett Kavanaugh.

There are several facts, however, that stand in the way of quashing the subpoenas. Because the documents relate to Trump's extensive financial dealings before he became

president, rather than any conduct while in office, there is no claim of "executive privilege." Similarly, because the documents are not communications between Trump and his lawyers, there is no "attorney-client" protection either.

In fact, the subpoenas are not directed to Trump at all, and he is under no obligation to respond to them. Thus Trump cannot even claim that the burden of complying with the requests for documents would distract him from his presidential duties in administering the executive branch.

Nevertheless, Trump's Supreme Court petitions assert that a sitting president can block everyone with whom he did business before the inauguration from turning over documents relating to their transactions to congressional committees or to grand juries investigating criminal conduct.

All six lower courts that have ruled on Trump's motions to quash the subpoenas—three federal district courts and three United States courts of appeals—rejected his breathtakingly broad claim that a sitting president has blanket immunity from congressional and criminal investigations, even subpoenas directed at third parties in possession of documents generated before his or her taking office, because they could be harassing.

Many were surprised when the Supreme Court accepted review, as the lower court rulings were grounded in a series of Supreme Court decisions that have been followed for decades. The principal precedent, decided unanimously in 1974, rejected President Richard Nixon's claim of executive privilege and ordered him to respond to federal grand jury subpoenas seeking information about the Watergate burglary and ensuing cover-up. That ruling led directly to the release of incriminating White House tapes, and ultimately to Nixon's resignation in disgrace.

The second precedent, also decided unanimously, is the 1997 decision that allowed the Paula Jones civil case for sexual harassment against Bill Clinton, which allegedly occurred long before Clinton's elevation to the White House, to proceed while he was still in office. During the deposition that took place as a result of the Supreme Court's ruling, Clinton gave an untruthful response to a question

about sexual relations with White House intern Monica Lewinsky. That became the pretext for an anti-democratic impeachment drive in which the newest Supreme Court associate justice, Brett Kavanaugh, participated as an assistant to Special Prosecutor Kenneth Starr.

On Tuesday, Trump's personal lawyer, Patrick Strawbridge, argued first, lashing out at the House committees for supposedly harassing the president by seeking his financial information from third parties. Chief Justice Roberts forced Strawbridge to concede that Congress must have at least some power to subpoena the president's personal papers, and summed up the issue as "the courts balancing the competing interests on either side."

Most of the ensuing banter between the justices and the attorneys, including both a deputy solicitor general and Solicitor General Noel Francisco himself arguing in favor of Trump's positions, concerned the extent to which the general subpoena power of Congress or a grand jury should be limited when directed at documents relating to a sitting president's activities before assuming office.

After House of Representatives lawyer Douglas Letter took the position that congressional subpoenas should be enforced so long as they are "relevant to a legislative purpose," Roberts asked for an "example of a subject that you think is beyond any legislation that Congress could write." When Letter opted not to make up a hypothetical on the spot, and instead responded that Congress' legislative power is "extremely broad," Roberts responded, "[T]hat is not really much of a test. It's not a limitation."

Right-wing Associate Justice Samuel Alito, acting more like another lawyer for Trump than a judge, told Letter he was "somewhat baffled" that "the protection against the use of a subpoena for harassment" of the president is "simply the assessment whether the subpoena is relevant to some conceivable legislative purpose." "That's no protection, is it?" Alito asked rhetorically.

Alito's questioning assumed that the federal judiciary, and ultimately the Supreme Court, needs to protect the president from being "harassed" by the House of Representatives, even where the "harassment" consists of nothing more than serving third parties with subpoenas for documents.

Nor was it explained how compelling the production of existing documents regarding a president's prior financial transactions might constitute harassment. The premise of Alito's question was that the documents' contents are embarrassing for Trump.

In any event, according to the powers of oversight granted to Congress by the US Constitution, in principle, the House of Representatives should itself determine whether subpoenaed documents relate to its own legitimate legislative concerns. The Supreme Court's inserting itself

and the entire federal judiciary, which is increasingly stacked with Trump-appointed reactionaries, between the House and the executive branch to arbitrate when congressional investigations are too "harassing," is itself an anti-democratic infringement on the balance of powers between the three branches of government.

The House was conceived of by the framers as the most democratic of all United States government bodies. Created first by Article 1, Section 2 of the Constitution, its members are elected directly every two years, and are apportioned by population. In contrast, the judiciary, as set forth in Article 3, is the least democratic, as its members are lifetime appointees insulated from any popular vote.

Initiating the second argument, Trump's personal attorney Jay Sekulow told the Supreme Court that Article 2 of the Constitution, which creates the executive branch, gives Trump "temporary presidential immunity" from any criminal investigation while in office, including grand jury subpoenas for documents served on third parties. The fact that the Supreme Court would even consider whether the president is so broadly exempt from rules of law that apply to everyone else underscores the speed with which basic democratic norms are being dismantled.

Based on the questions and statements made during Tuesday's oral arguments, most commentators expect rulings that will give Trump some, but not all, the protection he seeks. There are multiple countervailing political considerations at play among the nine justices, so predictions about which legal positions will ultimately receive the necessary five votes cannot be made with any accuracy.

Typically, the decisions would be expected before the end of the Supreme Court's current term, shortly before the July 4 holiday. It is not known presently to what extent the COVID-19 crisis will delay resolution. Moreover, the rulings may very well fashion new legal standards, with the cases being sent back to the lower courts for redeterminations, leading to more appeals that will delay any resolution until after the November election.



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